ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition for Expedited Rulemaking To	)	DA No. 97-1211
Establish Reporting Requirements and	)	
Performance and Technical Standards for	)	RM 9101
Operations Support Systems	)	

Reply Comments of the Competition Policy Institute

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SUMMARY

The Competition Policy Institute supports the Petition for an Expedited Rulemaking (Petition) of LCI International Telecom Corp. and Competitive Telecommunications Association. The Commission will hasten the arrival of local exchange telephone competition if it adopts reporting requirements and performance standards for access to operations support systems (OSS).

The relief sought in this Petition will remove a major barrier that has slowed the growth of local exchange telephone competition. Clear reporting requirements and uniform minimum OSS standards will benefit consumers, incumbent local exchange carriers and competitors. Consumers will realize the benefits of competition sooner and competition will develop more smoothly; ILECs will face an unambiguous set of OSS requirements and be free from conflicting demands from competitors; competitors will be able to determine if incumbent local exchange companies are complying those requirements. Further, for Bell Operating Companies, the Commission's OSS standards can serve as a "safe harbor" condition for judging whether a BOC has fully complied with this requirement of the competitive checklist in an application for authority to enter the interLATA market.

Given the connection of OSS compliance to Section 271 and the multi-state character of the OSS operations of many incumbent local exchange companies, it is appropriate for the Commission to promulgate national standards for access to OSS. However, the Commission's effort must also recognize that state regulators share responsibility with the FCC to regulate this important aspect of interconnection. The FCC should not seek to displace or duplicate the efforts on OSS

compliance underway by state regulators. The Commission should integrate state regulators (through their representatives) into the negotiations and rulemaking process. Further, the FCC's rules should not preclude states from adopting stricter standards than those adopted by the Commission.

With regard to technical standards for OSS interfaces, the Commission should rely, to the extent feasible, on industry fora to develop these technical standards. Although the industry efforts in this area have only just begun, (and by some accounts have been disappointing), it is reasonable to refer issues of such technical complexity to the industry experts. However, the Commission should motivate the industry effort by adopting a reasonable deadline for completion of the standard-setting process, backed-up with the determination that the Commission will set technical standards if the industry participants fail to meet the deadline.

The Commission should also craft an effective and efficient system to enforce the requirements of the rules adopted in this case. CPI agrees with comments that the Commission should adopt structural penalties (e.g., prohibitions on marketing interLATA services) for BOCs that fail to provide non-discriminatory and adequate access to OSS functions.

CPI continues to support the suggestion in the Commission's Public Notice that it undertake a negotiated rulemaking. If properly conditioned by the Commission, a negotiated rulemaking may produce a superior result on these issues. CPI recommends that the Commission involve consumer representatives in the negotiations and requests to have the opportunity to participate.

REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE
PUBLIC NOTICE DA NO. 97-1211

Introduction

The Competition Policy Institute (CPI) hereby submits reply comments in the matter of the Petition for Expedited Rulemaking (Petition) filed by LCI International Telecom Corp. (LCI) and Competitive Telecommunications Association (CompTel) on May 30,1997.[1] CPI is an independent, non-profit organization that advocates state and federal policies to promote competition for telecommunications and energy services in ways that benefit consumers. In our initial comments, we supported the Petition of LCI and CompTel because the relief sought in the petition will enhance the opportunity for competition in the local exchange market. This will lead to lower prices, new services, and more choices for consumers of telecommunications services. CPI has reviewed the comments of more than twenty-five parties to this matter and reiterates its support for the Petition. Some of the commenting parties offered constructive suggestions that will likely improve the rulemaking process and we support those comments; the parties who filed in opposition to the Petition offered some comments that also deserve a reply and we appreciate the opportunity to respond to those comments as well.

The Need For a Rulemaking

In our initial comments, we described access to operations support systems as the Achilles heel of local competition. Experience is showing that the efforts of the FCC and the states to

[1]Comments and reply comments were requested by the FCC in its Public Notice issued June 10, 1997 (DA 97-1211).

stimulate local competition by developing correct prices for interconnection, unbundled network elements and resold service can be thwarted by a failed last step -- competitor access to OSS functions of the incumbent companies. The recitation of difficulties with OSS implementation contained in the Petition and in the comments of new entrants testifies to the central role that access to OSS systems plays in the development of competition and to the general failure of incumbent local exchange providers to adequate access to OSS functions.

The Commission received comments to this effect both from new entrants that are facilities-based[2] and those whose entry will be predominately through resale of ILEC facilities[3]. While the Petition was advanced by two entities (LCI and CompTel) who may be expected to enter the local exchange business largely through resale initially, Time Warner Communications Holdings (TWComm) and the Association for Local Telecommunications Services (ALTS) point out that the performance of the ILECs in the provision of unbundled loops and in the provision of number portability should be treated in standards. We concur with the comments of ALTS and Time Warner Communications that the Commission should consider these issues as well.

It is unfortunate, but perhaps not surprising, that each ILEC that filed comments opposes the adoption of OSS standards by the Commission. The opposition ranges from Southwestern Bell

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[2]See for example, the Comments of Time Warner Communications Holdings (TWComm) at 3. "The inability of CLECs to obtain access to ILEC OSS in a manner that will support the competitive provision of local telephone service has emerged as the single most important interconnection issue."

[3]See, for example, the Comments of KMC Telecom, Inc.

Telephone Company (SWBT) who concludes that the Commission does not have the authority under Section 251 of the Communications Act to adopt mandatory standards,[4] to the position of Ameritech that standards are not needed in view of the company's performance in its region. GTE joins SWBT in questioning the Commission's jurisdiction.[5] Other LECs and USTA argue generally that sufficient progress is being made so that the need for national standards is obviated. Curiously, USWest attempts to deflate the Petition by suggesting that the *Commission* has created the OSS issue by adopting an "aggressive timeline for electronic access to OSSs." According to USWest, "A more conservative implementation schedule would leave those complaining about the state of implementation with little to complain about."[6]. Each of the commenting LECs argues that the states are in a better position to determine performance standards than the Commission. Another theme in the BOC comments is that the OSS issue has been created to keep the BOCs out of long distance. SWBT makes the explicit claim that "The Petition's real purpose is to keep RBOCs out of the Petitioners' lucrative long distance market."[7]

The Commission should consider most of these of these arguments carefully. We offer the following comments on the general arguments of the opponents to the Petition.

CPI believes that the Commission's jurisdiction to adopt requirements for reporting and

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[4]Comments of SWBT at 7.

[5]Comments of GTE at ii.

[6]Comments of USWest at 4.

[7]Comments of SWBT at 16.

measuring OSS access and for minimum standards in this area is clear under Section 251 of the Communications Act. The recent decision of the 8th Circuit Court of Appeals affirmed the Commission's decision to identify OSS access as a network element that must be unbundled under the Act and the decision did not compromise the FCC's authority to grant the Petition. Further authority to interpret compliance with OSS requirements flows from the Act's charge to the FCC under Section 271 of the Communications Act to rule on compliance with the competitive checklist. Several parties offered cogent arguments that the Commission has jurisdiction over this issue and CPI concurs in those analyses.[8]

The ILECs' refrain that OSS implementation is proceeding smoothly must be checked by the FCC against the realities of the marketplace. Here the "proof of the pudding is in the eating": in every state and in every region, consumers do not have a realistic choice for competitive local telephone service today. CPI concurs with the commenters who conclude that the OSS is probably the largest contributing factor. CPI submits that the testimonials of competitors and the findings of state commissions demonstrate that the Commission must reinsert itself into the OSS debate. Without a doubt, there is much activity on access OSS. But we suspect a lot of that activity is uncoordinated and unproductive. By any measure, the country is far from having a seamless system of interfaces between competing companies sufficient to allow carriers to compete for customers' business and provide consumers with realistic choices. A large part of the problem, which the Commission can now address, is a lack of uniformity, even as to the rudiments of measuring OSS compliance. We continue to believe that the incumbents and

[8]See, for example, the Comments of Excel Communications, Inc. at 3.

competitors inhabit a Tower of Babel when it comes to OSS.

As to the motivation of the interexchange carriers bringing this Petition -- it doesn't matter. The bargain struck in the United States Congress is that RBOCs may enter the long distance markets only after they have sufficiently opened their local markets. This includes providing non-discriminatory access to OSS functions. It is the prerogative of any competitor to try to enforce that bargain. Indeed, it is the *obligation* of the FCC to enforce that bargain. The Commission should disregard the bad faith charge of SWBT and consider the Petition on its merits. More generally, CPI respectfully suggests that the Commission ignore the rhetoric (on both sides) and focus efforts on moving local competition forward.

In Ameritech's comments, much is made of the fact that the Commission declined to adopt national standards for access to OSS functions in its *First Report and Order*[9] and its *Second Order on Reconsideration*[10]. Ameritech essentially suggests that the Commission should stay that course. CPI agrees with Ameritech's characterization of those decisions, but suggests that the Commission should not hold itself to a "foolish consistency." The Commission must determine in this case whether its assumptions about access to OSS functions (including electronic interfaces by January 1, 1997) have proven to hold, or whether changed circumstances require the Commission to modify its previous stance on this issue.

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[9]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, First Report and Order.

[10]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, Second Order on Reconsideration.

As CPI suggested in its initial comments, much of the widespread dissatisfaction with the marketplace progress of local competition can be traced to inadequate access to "back office" systems of the incumbent local exchange companies. The failure of the LECs to provide access to OSS functions in full compliance with the Commission's prior order has caused new entrants to delay their entry into local service competition and to make their entry attempts less successful.

The heady days following the signing of the Telecommunications Act of 1996, in which robust local competition seemed to be just around the corner, have given way to the mundane reality that achieving local competition is much more difficult than supposed. We think it is reasonable for the Commission to consider new tactics, such as those proposed in this Petition, to make local competition a reality.

The comments of the California Public Utilities Commission (CPUC) and the Wisconsin Public Service Commission (PSCW) support the need for the FCC to re-enter the OSS debate. The California commission finds that a rulemaking should be issued and that "there is a need to put to rest the national debate on what these standards should be."[11] Although the PSCW may differ on the level of detail that should accompany FCC rules, the Wisconsin commission endorses the need for the disclosure of performance standards and agrees that guidance from the FCC on various aspects of OSS compliance is needed.[12] The CPUC and the National Association of

[11]Comments of CPUC at 2.

[12]Comments of PSCW at 1 and 5.

Regulatory Utility Commissions (NARUC) each stress the complementary role of the States and the FCC on this issue, a position that CPI endorses and discusses below.[13]

In conclusion, CPI continues to believe that there is a pressing need for the Commission to initiate a rulemaking as requested by LCI and CompTel. Our support for the petition can be reduced to three basic reasons:

1) It is necessary to follow through on the start made in the Commission's *First Report and Order* by providing standards and measurement criteria for compliance with the OSS requirements;

2) Enhanced compliance will benefit consumers and fulfill the reasonable expectation of consumers that they should be able to exercise choice for local carriers;

3) Rules will benefit both new entrants and incumbent local exchange companies.

Scope of Commission Rules

Measurement and Performance. The Petitioners make a compelling case for rules requiring the ILECs to disclose whether standards exist for OSS functions and what those standards are. It is self-evident that the ability of competitors, regulators *and incumbent LECs* to judge whether access to OSS is non-discriminatory relies fundamentally on this information.

Closely related to this disclosure requirement is the measurement of OSS performance. CPI agrees with the commenters supporting the Petition that the Commission should define, for each OSS element, how performance and compliance with parity is to be measured. Once again, this is basically an issue of *vocabulary:* without a standard method for discussing and measuring OSS

[13]Comments of CPUC at 8, NARUC at 3.

performance, it is impossible to determine whether performance is adequate and whether access to OSS functions is being provided without discrimination.

Where an ILEC provides an OSS function to itself and to a competitor, the standard of performance should be parity: does the ILEC provide competitors access to the OSS function in substantially the same manner that it provides the element to itself? But CPI also agrees with LCI that this parity requirement should also be subject to a reasonableness standard.[14] In cases where the ILEC does not maintain or provide performance standards, it is appropriate for the Commission to establish default standards. CPI agrees with the California PUC that the development of standards in such a case should be a cooperative effort of state and federal regulators.

Technical Standards. In a perfect world, technical standards for electronic interfaces between competitors would be developed by engineers, not policy vice-presidents and attorneys. With regard to technical standards for OSS interfaces, CPI believes the Commission should rely, to the extent feasible, on industry fora to develop these technical standards. Although the industry efforts in this area have only just begun, (and by some accounts have been disappointing), it is reasonable to refer issues of such technical complexity to the industry experts. However, the Commission should motivate the industry effort by adopting a reasonable deadline for completion of the standard-setting process, backed up with the determination that the Commission will set technical standards if the industry participants fail to meet the deadline.

[14]See Comments of LCI International ("Corrected Version") at 6.

On this issue, we support the comments of AT&T, Sprint and others that industry fora are the appropriate venues to attempt to resolve these issues.[15] Some commenters complain that these industry groups are dominated by incumbent providers and do not have sufficient motivation to arrive at industry-wide solutions. It is an unfortunate fact that these cooperative efforts, which have served the telecommunications industry so well in the past, are partially hobbled when competitive considerations invade their recommendations and decisions. Nevertheless, CPI notes that these bodies operate by consensus, allowing any party to object to a standard that favors one interest over another. Therefore, CPI has a preference for the Commission trying to make such fora work.

Federal-State Cooperation

As CPI suggested in our initial comments, this proceeding affords the opportunity for state and federal regulators to coordinate their efforts on OSS compliance. While we believe there is a clear-cut case for the FCC to adopt uniform standards for reporting, measurement and default performance standards, the balance between federal standards and federal guidance is an issue that, frankly, must be worked out with state commissioners. CPI joins those who wish to avoid a jurisdictional battle over an issue so critical to local exchange competition. CPI agrees with the Petitioners that the FCC should require the ILECs to state the internal standards that now apply to OSS functions and should establish minimum standards where none exist. States should be able to adopt OSS standards that are stronger than any minimum requirements set by the FCC.

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[15]See comments of AT&T at 33 and Sprint at 2.

For these reasons, state commissions should be central players in developing the minimum standards through the proceeding sought by the Petitioners in this case. Below we discuss the conditions under which the Commission should consider a negotiated rulemaking. An essential feature of a successful negotiation will be the involvement of state regulators. CPI also believes that the rulemaking will profit from the participation of consumer representatives, including state consumer advocates, since these issues are so close to the important consumer concerns of local competition and service quality.

The Use of Negotiated Rulemaking

In our initial comments CPI supported, with qualifications, the use of a negotiated rulemaking to develop OSS performance standards. CPI suggests that a negotiated rulemaking would be more likely to succeed if it has certain attributes:

- The Commission should impose strict time limits on the negotiations.
- The Commission should require the negotiations to permit the involvement of all parties of interest, including state regulators and consumer representatives.
- Negotiating parties should understand that failure to reach agreement means that the Commission will adopt rules anyway.
- Assuming negotiations permit involvement by all parties of interest, the Commission should accord substantial deference to the agreements worked out in the negotiations.
- The Commission should not accept partial stipulations that do not represent a consensus, but should accept agreements that address fewer than all the issues.
- The Commission should consider designating a neutral facilitator to assist the negotiations.
- The Commission should ensure that negotiators have access to data needed to make negotiations productive.

A few parties commented on the Commission's suggestion that it use a negotiated rulemaking process. Sprint opposes a negotiated rulemaking, suggesting that the ILECs lack the incentives to reach an industry consensus.[16] AT&T and CompTel support a negotiated rulemaking but only with the conditions that the ILECs be required to disclose data on their current OSS performance and that the Commission keep a negotiated rulemaking on a strict time frame.[17] These conditions are among the list of conditions CPI had recommended.

CPI acknowledges that there are some risks inherent in using a negotiated rulemaking. It is always possible that the parties on the "slow side" of a case will delay resolution by causing negotiations to be protracted. However, the Commission can guard against that outcome in several ways. First, as we suggested, the Commission should adopt a relatively short time frame for negotiations. In our comments, CPI suggests that the Commission end negotiations after four weeks unless the parties report that progress is being made.[18] We realize that four weeks may not be enough time to settle all of the issues, but it is enough time to determine whether negotiations are likely to lead to any agreements. Second, the Commission should make it clear to negotiating parties that the Commission will adopt rules if negotiations do not lead to an agreement. In this case, as with all negotiations, the parties must have both positive and negative incentives to reach agreements in negotiation. Finally, CPI believes that negotiations will profit from the

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[16]Comments of Sprint at 13.

[17]Comments of AT&T at 37, CompTel at 8.

[18]In its Comments, LCI (at 4) suggests that the Commission allow six weeks for negotiations. AT&T (at 37) suggests 20-30 days.

involvement of consumer representatives and requests that the CPI, among others, have the opportunity to participate in the negotiations.

Connection of OSS Rules to Section 271 Applications

In our initial comments, CPI noted that Commission rules on OSS would benefit the Bell Operating Companies seeking to gain approval for entry into the interLATA market. We explained that national standards for OSS compliance (especially in those areas where internal standards do not now exist) would assist the BOC, the states, and the Commission by providing an unambiguous target. This concept was given further definition by Sprint, who recommends that the Commission's OSS standards should constitute a "safe harbor" in the evaluation of a BOC's petition for interLATA authority under Section 271 of the Communications Act. ALTS and AT&T offered similar analyses.[19] CPI agrees with the comments of each of these parties on this issue.

Enforcement

In our initial comments, CPI noted that the entire U.S. telecommunications industry will eventually conclude that a robust, transparent electronic interface is in its collective best interest. But until competition takes hold fully and all competitors see such a system as mutually beneficial, the Commission must act to enforce compliance with its requirement for parity of access. Today's incumbent providers still have a strong incentive to discriminate against potential competitors by providing inferior access to OSS features. The provisions of Sections

[19]Comments of AT&T at 38.

251 and 271 of the Communications Act provide some incentives, at least to some of the incumbent LECs, to deploy systems that afford non-discriminatory access to OSS functions. But those incentives are undoubtedly weighed against the costs of loss of market share that new entrants will inevitably cause.

CPI recommended that the Commission adopt enforcement penalties that recognize the substantial value that strategic non-compliance can yield. If the Commission adopts a system of monetary fines, we suggested that they must be substantial enough to dissuade a carrier from adopting non-compliance as a strategy.

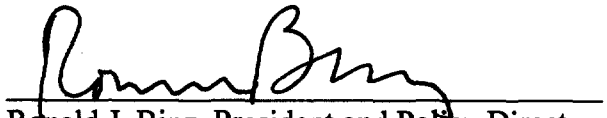
Alternatively, we suggested that the Commission could "make the punishment fit the crime." A carrier that discriminates against competitors by providing discriminatory access to OSS will have failed to meet the continuing obligations of Section 251 of the Communications Act and it would be appropriate for the Commission to require the offending BOC to cease marketing interLATA services to new customers and stop accepting customer orders until compliance with the OSS requirement has been re-established. Several commenters made substantially the same recommendation.[20]

[20]See, for example, Comments of ALTS at 19, LCI at 10 and AT&T at 29.

Conclusion

CPI supports the Petition of LCI and CompTel and agrees with the need for the Commission to act expeditiously to put rules in place. If the Commission elects to use a negotiated rulemaking, CPI requests that it have the opportunity of participating in the negotiations.

Respectfully Submitted,



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Certificate of Service

I, Bridget J. Szymanski, hereby certify that on this thirtieth day of July, 1997, copies of the foregoing Reply Comments of the Competition Policy Institute were served by hand or by first-class, United States mail, postage prepaid, upon each of the following:

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